Putra Perdana Construction Sdn Bhd v AMI Insurance Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D5 (S2)–22–58 OF 2000
RAMLY ALI J
20 OCTOBER 2004

Insurance — Fire insurance — Claim on policy — Compliance with Bank Negara Guidelines — Whether guidelines have force of law — Whether mere technical breach by insured — Whether guideline complied by insurer

Insurance — Fire insurance — Construction of policy — Whether condition was condition precedent to liability — Effect of condition precedent to claim

Insurance — Fire insurance — Repudiation of liability — Failure to comply with condition precedent — Whether condition incapable of performance or vague — Whether breach was material

Insurance — Fire insurance — Waiver — Whether failure to comply with condition precedent waived — Proof of knowledge of breach — Test to be applied — Whether insurer has right to insist on compliance of condition waived based on settlement of previous claims

The plaintiff was the main contractor of a project ('the project') involving the construction of multi-storey office buildings with basement car parks. The plaintiff obtained a contractor's all risk and third party liability insurance policy from the defendants. The policy includes a special condition concerning fire fighting facilities and fire safety at the construction site ('condition 29'). General Condition 3 of the policy stipulates that all conditions of the policy are to be regarded as condition precedent. A fire broke out at the basement car park of one of the blocks which was still under construction causing considerable damage. Upon the plaintiff's claim on the policy, the first defendant issued a notice of repudiation of liability under the policy. The ground of repudiation was the breach of condition 29 and substantial details were given of the various breaches relied on. Consequently, the plaintiff commenced this action claiming loss and/or damages suffered as a result of the repudiation of liability by the defendants under the policy. The plaintiff also contended that: (i) the terms of condition 29 were incapable of performance; (ii) condition 29 was vague and ambiguous, and (iii) even if there were breaches of condition 29, these were not material to the loss; (iv) the defendants had failed to comply with Bank Negara Malaysia ('BNM') Guidelines in denying the claim merely on the ground of technical breach of warranty or policy conditions which were immaterial or unconnected to the circumstances of the loss, there being no fraud in this case. The defendant submitted that the plaintiff failed to comply with or otherwise, had breached the provisions of condition 29 of the policy. Accordingly, since condition 29 of the policy was a condition precedent and there was non-compliance and/or breach of this condition, the defence contended that no

liability was attached under the policy and therefore the defendants are entitled to repudiate liability.

The issues for determination by the court were: (i) whether condition 29 was a condition precedent, especially in view of General Condition 3 of the policy; (ii) whether the plaintiff had to comply with or had otherwise breached the provisions of condition 29; and (iii) whether the defendants were estopped from relying or have waived their rights to rely on condition 29 to repudiate liability under the policy.

Held, dismissing the plaintiff's claim with costs:

(1) Reading condition 29 together with general condition 3 clearly indicates that condition 29 is a condition precedent to any liability that may arise under the policy. It is a well-established rule of construction of a policy of insurance that the entire policy should be considered. On this basis, where a particular general clause (ie General Condition 3) provides that all conditions (including condition 29) are to be treated as condition precedent, then effect must be given to this. Thus, condition 29 must be read with general condition 3 and this undoubtedly rendered condition 29 as a condition precedent (see paras 15–16).

(2) When a term in a policy is stipulated to be a condition precedent to the liability of the insurer, the condition has to be strictly complied with by the insured before the insured is entitled to bring a claim on the policy; *Chong Kok Hwa v Taisho Marine & Fire Insurance Co Ltd* [1977] 1 MLJ 244 followed (see para 21).

(3) Where an insurer seeks to repudiate liability for a breach of a condition precedent by the insured, the insurer is not required to show that he has been prejudiced by the breach; *Pioneer Concrete (UK) v National Employers Mutual General Insurance Association Ltd* [1985] 1 Lloyd's 274 followed. In the present case, the defendants need not show that the breach to comply with condition 29 by the plaintiff has prejudiced them. As such, the breach of or non-compliance with condition 29 (a condition precedent), without more, was sufficient for the defendants (as insurer) to repudiate liability under the policy (see paras 22 and 23).

(4) The evidence of breach of condition 29 by the plaintiff was overwhelming, particularly items 1, 2, 3, 4, 5 and 6 (see para 50).

(5) There was no protest on the inclusion of condition 29, prior or even after the policy was executed. Looking at some of the relevant terms of condition 29, it was clear that each and every requirement could be properly observed and performed. Thus, where the meaning of the words used was clear (as in condition 29), effect must be given to it. One should not strain the language to find an ambiguity when none exists. The words used in condition 29 are plain and simple. No technical words or

complex phrases are used. There was no ambiguity. Therefore, the plaintiff's allegation that condition 29 was vague and ambiguous could not stand and must be rejected (see paras 53, 54 and 62).

(6) Before a waiver can be asserted, it must be shown that the insurer had full and actual knowledge of the breach. Knowledge of the breach cannot be imputed to the defendants simply because the circumstances suggest that there was a possibility of a breach of condition 29. This was especially so since the plaintiff was contractually bound to comply with condition 29. It was not for the defendants to remind the plaintiff to comply; *Arterial Caravans Ltd v Yorkshire Insurance Co Ltd* [1973] 1 QB 169; *Victor Melik & Co Ltd v Norwich Union Fire Insurance Society Ltd* [1980] 1 Lloyd's Rep 523 and *Chong Soo Sin v Industrial & Commercial Insurance (M) Bhd* [1992] 1 MLJ 636 followed. The court ruled there was simply no knowledge on the part of the defendants of the breaches of condition 29 by the plaintiff, much less full knowledge. Therefore, the plaintiff reliance on waiver/estoppel was absolutely untenable (see paras 65–67 and 70).

(7) Simply because the insurer defendants had settled previous claims in the past, the defendants could not therefore be prohibited from repudiating this subsequent claim. Each claim is treated differently based on the facts and circumstances that give rise to the claim. The insurer could repudiate any claim if there were grounds to do so. It was simply impossible to suggest that settlement of these previous claims could set up a waiver against the defendants. There were also no merits in the plaintiff's contention that the defendants waived their rights to rely on the plaintiff's breaches just because they allowed the repairs to proceed (see paras 72 and 75).

(8) The Bomba report and the investigation of the loss adjusters showed that the breach of condition 29 was indeed, material. Accordingly, the contention by the plaintiff that the breach of condition 29 was not material to the loss must fail (see para 79).

(9) Even assuming that the said BNM Guidelines have the force of law (being subsidiary legislations), the defendants did not breach the provisions of the BNM Guidelines in repudiating their liability under the policy. The Guidelines prohibit the insurer from denying a claim merely on the grounds of technical breaches of warranty or policy conditions which are not material or unconnected to the circumstances of the loss. In order to be caught under the said Guidelines, the breaches in question must be in the nature of 'technical breaches' and such 'technical breaches' must be 'not material or unconnected to the circumstances of loss'. In the present case, condition 29 was a condition precedent in the policy which must be strictly complied with by the plaintiff. They are substantive conditions, not merely technical in nature. The plaintiff's breach of condition 29 was not technical in nature. They were material breaches,

connected to the circumstances of the fire and the loss. As such, the defendants were right in repudiating liability under the policy (see paras 83–84).

[Bahasa Malaysia summary

Plaintif adalah kontraktor utama suatu projek ('projek tersebut') yang melibatkan pembinaan pejabat bangunan bertingkat dengan tempat letak kereta di tingkat bawah tanah. Plaintif telah mendapatkan polisi insurans kontraktor seluruh risiko dan liabiliti untuk pihak ketiga daripada defendan-defendan. Polisi tersebut mengandungi syarat-syarat termasuk syarat istimewa mengenai kemudahan melawan api dan keselamatan kebakaran di tapak pembinaan ('syarat 29'). Syarat am 3 polisi tersebut memperuntukkan bahawa kesemua syarat-syarat polisi tersebut adalah syarat terdahulu. Satu kebakaran berlaku di tempat letak kereta bawah tanah di salah satu blok yang masih di dalam pembinaan yang menyebabkan kerosakan yang agak teruk. Apabila plaintif menuntut ke atas polisi tersebut, defendan pertama mengeluarkan satu notis penolakan liabiliti di bawah polisi tersebut. Alasan penolakan adalah pengingkaran syarat 29 dan butir-butir berbagai pengingkaran diberikan. Plaintif kemudiannya memulakan tindakan ini menuntut kehilangan dan/atau kerugian yang ditanggungnya disebabkan penolakan liabiliti oleh defendan-defendan di bawah polisi tersebut. Plaintif juga mengatakan bahawa: (i) terma-terma syarat 29 tidak dapat dilaksanakan; (ii) syarat 29 tidak jelas dan kabur, dan (iii) walaupun jika terdapat pengingkaran syarat 29, ianya tidak material dengan kehilangan; (iv) defendan-defendan telah gagal untuk mematuhi Garis Panduan Bank Negara Malaysia ('BNM') dalam menolak tuntutan tersebut hanya pada alasan pengingkaran teknikal waranti atau syarat-syarat polisi yang tidak material atau tidak berkait dengan keadaan berhubung dengan kehilangan, tiada terdapat penipuan di dalam kes ini. Defendan mengadu bahawa plaintif gagal untuk mematuhi dan telah melanggar peruntukan-peruntukan syarat 29 polisi tersebut. Oleh kerana syarat 29 polisi tersebut adalah satu syarat terdahulu dan terdapat ketidakpatuhan dan/atau pengingkaran syarat tersebut, pihak defendan mengatakan bahawa, tidak terdapat liabiliti di bawah polisi tersebut dan oleh yang demikian defendan-defendan berhak untuk menolak liabiliti.

Isu-isu untuk diputuskan oleh mahkamah adalah: (i) sama ada syarat 29 adalah syarat terdahulu, terutama memandangkan syarat am 3 polisi tersebut; (ii) sama ada plaintif mesti mematuhi atau telah melanggar peruntukan-peruntukan syarat 29; dan (iii) sama ada defendan-defendan telah diestop dari membalas atau telah mengetepikan hak-hak mereka untuk bergantung kepada syarat 29 untuk menolak liabiliti di bawah polisi tersebut.

Diputuskan, menolak tuntutan plaintif dengan kos:

(1) Syarat 29, bila bersama dengan syarat am 3, jelas menunjukkan bahawa syarat 29 adalah satu syarat terdahulu kepada sebarang liabiliti yang

mungkin akan timbul di bawah polisi tersebut. Ianya merupakan satu kaedah pentafsiran polisi insurans yang mantap bahawa sesuatu insurans hendaklah dilihat secara menyeluruh. Pada dasar ini, di mana sesuatu klausa am tertentu (iaitu syarat am 3) memperuntukkan bahawa kesemua syarat-syarat (termasuklah syarat 29) dianggap sebagai syarat terdahulu, maka ianya hendaklah diberi maksud yang sebegitu. Dari itu, syarat 29 mestilah dibaca bersama dengan syarat am 3 dan ini dengan jelasnya membuatkan syarat 29 sebagai satu syarat terdahulu (lihat perenggan 15–16).

(2) Apabila sesuatu terma di dalam polisi diperuntukkan sebagai syarat terdahulu kepada liabiliti penanggung insurans, syarat tersebut hendaklah dipatuhi dengan ketat oleh pengambil insurans sebelum pengambil insurans berhak untuk membawa tuntutan di bawah polisi tersebut; *Chong Kok Hwa v Taisho Marine & Fire Insurance Co Ltd* [1977] 1 MLJ 244 diikut (lihat perenggan 21).

(3) Bilamana penanggung insurans ingin menolak liabiliti kerana satu pengingkaran syarat terdahulu oleh pengambil insurans, penanggung insurans tidak perlu untuk menunjukkan bahawa beliau telah diprejudiskan oleh pengingkaran tersebut; *Pioneer Concrete (UK) v National Employers Mutual General Insurance Association Ltd* [1985] 1 Lloyd's 274 diikut. Di dalam kes semasa, defendan-defendan tidak perlu untuk menunjukkan bahawa pengingkaran dalam mematuhi syarat 29 oleh plaintif telah memprejudiskan mereka. Dari itu, pengingkaran atau ketidakpatuhan syarat 29 (satu syarat terdahulu), telah memadai bagi defendan-defendan (sebagai penanggung insurans) untuk menolak liabiliti di bawah polisi tersebut (lihat perenggan 22 dan 23).

(4) Keterangan mengenai pengingkaran syarat 29 oleh plaintif teramat banyak terutama butiran 1, 2, 3, 4, 5 dan 6 (lihat perenggan 50).

(5) Tidak terdapat bantahan mengenai kemasukan syarat 29, sebelum atau selepas polisi tersebut dimeterai. Melihat kepada sebahagian dari terma relevan syarat 29, adalah jelas bahawa setiap satu boleh dipatuhi dan dilaksanakan. Maka, bilamana maksud perkataan-perkataan yang digunakan adalah jelas (seperti di dalam syarat 29), ia mesti dikuatkuasakan. Adalah tidak wajar untuk mencari kesamaran apabila ianya tidak wujud. Perkataan-perkataan yang digunakan di dalam syarat 29 adalah jelas dan ringkas. Tiada perkataan-perkataan teknikal atau frasa yang kompleks digunakan. Tidak terdapat kesamaran. Oleh yang demikian, dakwaan plaintif bahawa syarat 29 adalah tidak jelas dan nyata tidak dapat diterima dan mestilah ditolak (lihat perenggan 53, 54 dan 62).

(6) Sebelum penepian dapat ditegaskan, ianya mestilah ditunjukkan yang penanggung insurans mempunyai pengetahuan penuh mengenai pengingkaran. Pengetahuan mengenai pengingkaran tidak boleh diambil kira semata-mata kerana kemungkinan terdapatnya satu pengingkaran syarat 29. Terutama sekali apabila plaintif terikat secara kontrak untuk

mematuhi syarat 29. Ianya bukan tugas defendan-defendan untuk mengingatkan plaintif mengenainya; *Arterial Caravans Ltd v Yorkshire Insurance Co Ltd* [1973] 1 QB 169; *Victor Melik & Co Ltd v Norwich Union Fire Insurance Society Ltd* [1980] 1 Lloyd's Rep 523 dan *Chong Soo Sin v Industrial & Commercial Insurance (M) Bhd* [1992] 1 MLJ 636 diikuti. Mahkamah memutuskan bahawa defendan-defendan tidak mempunyai pengetahuan mengenai pengingkaran plaintif terhadap syarat 29. Oleh yang demikian, plaintif tidak dapat bergantung pada penepian/estopel (lihat perenggan 65–67 dan 70).

(7) Hanya kerana penanggung insurans/defendan-defendan menyelesaikan tuntutan-tuntutan terdahulu di masa lampau, defendan-defendan tidak boleh dilarang dari menolak tuntutan ini. Setiap tuntutan dianggap berbeza berdasarkan fakta-fakta dan keadaan-keadaan yang membangkitkan tuntutan. Penanggung insurans boleh menolak sebarang tuntutan jika terdapat alasan-alasan untuk berbuat demikian. Ianya tidak dapat diterima bahawa hanya kerana tuntutan diselesaikan di masa lampau maka terdapatnya penepian terhadap defendan-defendan. Tiada merit di dalam dakwaan plaintif yang bahawa defendan-defendan telah mengetepikan hak-hak mereka untuk bergantung kepada pengingkaran plaintif hanya kerana mereka membenarkan pembaikan dijalankan (lihat perenggan 72 dan 75).

(8) Laporan Bomba dan penyiasatan penaksir kerugian menunjukkan yang pengingkaran-pengingkaran syarat 29 sememangnya material. Oleh yang demikian, dakwaan plaintif yang pengingkaran syarat 29 adalah tidak material kepada kerugian mestilah gagal (lihat perenggan 79).

(9) Walaupun jika dianggap yang Garis Panduan BNM boleh dikuatkuasakan (sebagai perundangan subsidiari), defendan-defendan tidak mengingkari peruntukan-peruntukan Garis Panduan BNM kerana menolak liabiliti mereka di bawah polisi tersebut. Garis panduan tersebut hanya melarang penanggung insurans dari menolak tuntutan hanya atas alasan-alasan pengingkaran-pengingkaran teknikal waranti atau syarat-syarat polisi yang tidak material atau tidak berkait dengan keadaan-keadaan kerugian. Untuk tertakluk kepada Garis Panduan tersebut, pengingkaran-pengingkaran itu mestilah merupakan satu 'pengingkaran teknikal' dan 'pengingkaran teknikal itu' mestilah satu yang 'tidak material atau tidak berkait dengan keadaan-keadaan kerugian'. Dalam kes semasa, syarat 29 adalah satu syarat terdahulu di dalam polisi tersebut yang mesti dipatuhi dengan ketat oleh plaintif. Ia adalah syarat-syarat substantif, bukan hanya berbentuk teknikal. Pengingkaran plaintif terhadap syarat 29 bukan berbentuk teknikal. Ianya pengingkaran yang material, berkait dengan keadaan-keadaan kebakaran dan kerugian. Oleh yang demikian, defendan-defendan berhak menolak liabiliti di bawah polisi tersebut (lihat perenggan 83–84).

Notes

For cases on construction of policy, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 99–100.

For cases on waiver, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 121–122.

For fire insurance generally, see 4 *Halsbury's Laws of Malaysia* paras [60.390]–[60.417].

Cases referred to

Alder v Moore [1960] 2 Lloyd's Rep 325 (refd)
Arterial Caravans Ltd v Yorkshire Insurance Co Ltd [1973]1 Lloyd's Rep 169 (folld)
Chong Kok Hwa v Taisho Marine & Fire Insurance Co Ltd [1977]1MLJ244 (folld)
Chong Soo Sin v Industrial & Commercial Insurance (M) Bhd [1992] 1 MLJ 636 (folld)
Condogianis v Guardian Assurance & Co (1921) 2 AC 125 (refd)
Locker & Woolfe Company Ltd v Western Australian Insurance Company Ltd (1936) 54 Lloyd's Rep 211 (refd)
London Guarantee Company v Fearnley (1880) 5 AC 911 (refd)
London & Lancashire Fire Insurance Co v Boland (1924) AC 836 (refd)
Pioneer Concrete (UK) v National Employers Mutual General Insurance Association Ltd [1985] 1 Lloyd's Rep 274
Victor Melik & Co Ltd v Norwich Union Fire Insurance Society Ltd [1980] 1 Lloyd's Rep 523 (folld)
Woolford v Liverpool CC [1968] 2 Lloyd's Reps 256 (refd)
Yorke v Yorkshire Insurance Company (1918) 1KB 662 (refd)

Legislation referred to

Insurance Act 1996 s 201

CS Kumar (Sri Ram & Co) for the plaintiff.
Liew Teck Huat (TH Liew & Partners) for the defendants.

Ramly Ali J:

[1] The plaintiff was engaged in business as a building contractor. At the material time, the plaintiff was the main contractor of a project known as the Putrajaya Parcel D Project. The principal of the project was Putrajaya Holdings Sdn Bhd. The project involved the construction of nine units of multi-storey office buildings, with basement car parks. The contract period was stipulated to be from 28 October 1996 to 28 October 1998 (and subsequently extended).

[2] For the purpose of the project, insurance was put in place. This was affected vide a Contractors All Risk And Third Party Liability Insurance Policy subscribed by the three defendants. The proportion of risks accepted by the three defendants were as follows:

(1) First defendant — 50%

(2) Second defendant — 25%

(3) Third defendant — 25%.

[3] Section 1 of the said policy provides for the ambit of cover in the following terms :

> The insurers will indemnify the insured in respect of physical loss or damage to any of the property described in the schedule arising *from any cause* whatsoever not herein otherwise excluded.

[4] The policy includes a special condition concerning fire fighting facilities and fire safety at the construction site. This is condition 29, which is stipulated to be a 'special condition', which provides:

> 29 Special Conditions Concerning Fire Fighting Facilities and Fire Safety on Construction Site
>
> It is agreed and understood that otherwise subject to the terms, exclusions, provisions and conditions contained in the policy or endorsed thereon, the insurer shall only indemnify the insured for a loss or damage directly or indirectly caused by or resulting from fire or explosion, provided always that:
>
> (1) With regards to the progress of work adequate fire fighting equipment and sufficient extinguishing agents are available and operative at all times. Fully operative wet riser hydrants are installed up to one level below the current work level is sealed by temporary end caps.
>
> (2) The cabinets containing hose reels and portable fire extinguishers are inspected at regular intervals but at least twice a week.
>
> (3) Fire compartments required by local regulations are installed as soon as possible after the removal of formwork. Opening for lifts shafts, services ducts and other voids are provisionally closed as soon as possible but not later than at the commencement of fit out work.
>
> (4) Waste material is removed regularly. All floor undergoing fit out are cleared of combustible waste at the end of each working day.
>
> (5) 'Permit to work' system is implemented for all contractors engaged in 'hot work' of any kind such as not limited to:
>
> – grinding, cutting or welding operation
> – use of blow lamps and torches
> – application of hot bitumen or any other heat-producing operation
>
> 'hot work' is carried out only in the presence of at least one worker equipped with a fire extinguisher and trained in fire-fighting. The area of any 'hot work' is examined one hour after the work has finished.
>
> (6) Storage of materials for the construction or erection shall be subdivided into storage not exceeding the value stated below per storage unit. The individual storage unit shall be either at least 50m apart or separated by fire-proof walls.

(7) All inflammable material and especially all inflammable liquids and gases shall be stored at a sufficiently large distance from the property under construction or erection and any 'hot work'.

A Site Safety Coordination is appointed.

- A reliable fire alarm system is installed and whenever possible a direct communication link maintained with the nearest fire brigade.
- A fire Protection Plan and a Site Fire Action Plain are implemented and updated regularly. The contractor's personnel are trained in fire fighting and fire fighting drills carried out weekly.
- The nearest fire brigade is familiarised with the site and immediate access maintained for it at all times.

(8) The site is fenced off and access controlled.

Value per storage: RM5,000,000

[5] On 16 August 1999 at about 4.30pm a fire broke out at the basement car park of Block D10, which was still under construction. The fire spread rapidly and resulted in considerable damage. The Bomba was promptly called and arrived at site at about 4.45pm. At about 8.30pm the fire was extinguished. Following the fire incident, the Fire Department issued a report containing various findings as to the possible causes of the fire and recommendations.

[6] As a result of the fire, the plaintiff issued a notification of claim against the defendants. On 17 August 1999 the defendants appointed loss adjusters, Maphilindo Brocklehurst Sdn Bhd, to conduct investigations and adjustment on the matter. On or about 3 September 1999 Maphilindo's appointment was revoked and in its place, the defendants appointed Thomas Howell Group (M) Sdn Bhd to act. Thomas Howell conducted extensive investigations and issued several reports.

[7] Due to the extensive fire, forensic experts were also appointed to assist in the investigations. These experts were from Forensic Services (M) Sdn Bhd. Following the investigations, Forensic Services issued a report dated 11 October 1999 setting out their findings.

[8] On 1 March 2000 the first defendant issued a letter addressed to the insurance brokers, giving notice of repudiation of liability under the policy. The ground of repudiation was the breach of condition 29 and substantial details were given of the various breaches relied on. On 26 May 2000 the plaintiff commenced this action claiming loss and/or damages suffered as a result of the repudiation of liability by the defendants under the policy. On 8 July 2000 the defendants filed and delivered a defence in response to the claim instituted by the plaintiff. The plaintiff filed a reply on 10 October 2000. Prior to commencement of trial, the second defendant elected to settle and as such, had since ceased to be involved with this action. The settlement and consequential withdrawal of the claim against the second defendant was strictly

without prejudice to the right of the first and third defendants to maintain their repudiation and resist the plaintiff's claim in this action. **A**

THE PLAINTIFF'S CLAIM

[9] In the statement of claim, the plaintiff's case is pleaded simply on the basis that they are entitled to be indemnified for the loss under the policy, due to the damage sustained by reason of the fire. As such, to the plaintiff, the repudiation of liability by the defendants was wrongful. **B**

CASE FOR THE DEFENCE **C**

[10] The defence is principally predicated on *condition 29*. The defence contended that *condition 29* is a condition precedent by reason of the effect of General Condition 3 in the policy which provides: **D**

> All terms
>
> (a) are incorporated in and from part of this policy;
>
> (b) are to be deemed *conditions precedent* to any liability on the part of the insurers so far as they relate to anything to be done by the insured.

[11] The case for the defence is that the plaintiff failed to comply with or otherwise, had breached the provisions of *condition 29* of the policy. Accordingly, since condition 29 of the policy is a condition precedent and there were non-compliance and/or breach of this condition, the defence contended that, no liability attached under the policy and therefore the defendants are entitled to repudiate liability. **E** **F**

[12] In the response to the defence, the plaintiff filed a reply in which they essentially contended as follows:

(i) condition 29 was incapable of performance since works were on going at the project site and at various stages of completion; **G**

(ii) condition 29 is vague and ambiguous;

(iii) the plaintiff had made reasonable compliance with condition 29;

(iv) the defendants were estopped from and/or had waived their rights to rely on condition 29 because: **H**

(a) the defendants had knowledge of the breaches from the report of Asia Pacific Risk Management Centre Sdn Bhd;

(b) the defendants had settled fire claims previously brought by the plaintiff; the defendants had authorised the plaintiff to proceed with repair works and represented that an interim payment was forthcoming; and condition 29 was not material to the loss. **I**

[13] Earlier the court had directed that the trial should determine the issue of liability first. Therefore this ground of judgment accordingly is limited to the issue of liability. In this regard, only the evidence of SP1 to SP8 and SP13 (for the plaintiff) and SD1 to SD5 (for the defendants) are relevant for consideration at this stage.

ISSUES

[14] Having regard to the matter raised in the respective pleadings filed by the parties the following issues fall for determination by the court:

(i) Whether condition 29 is a condition precedent, especially in view of General Condition 3 of the policy;

(ii) Whether the plaintiff had to comply with or had otherwise breached the provisions of condition 29;

(iii) Whether the defendants were estopped from relying or have waived their rights to rely on condition 29 to repudiate liability under the policy.

ISSUE 1: WHETHER CONDITION 29 IS A CONDITION PRECEDENT, ESPECIALLY IN VIEW OF GENERAL CONDITION 3 OF THE POLICY

[15] Condition 29 clearly stipulates that the plaintiff was required to comply with and observe various fire safety measures in carrying out work in the project. A quick perusal of General Condition 3 will illustrate without doubt that condition 29 is a condition precedent. Reading condition 29 together with General Condition 3 clearly indicates that condition 29 is a condition precedent to any liability that may arise under the policy. It is a well-established rule of construction of a policy of insurance that the entire policy should be considered. On this basis, where a particular general clause (ie General Condition 3) provides that all conditions (including condition 29) are to be treated as condition precedent, then effect must be given to this. The author of *MacGillivray & Parkington On Insurance Law* (8th Ed) at p 448 para 1091, states, *inter alia*, the following:

> Where there is doubt as to the meaning of a clause or phrase, the whole of the policy should be examined in order to see what intention the parties appear to have had concerning the matters governed by the words in question … .

[16] Quite apart from interpreting the meaning of words and phrases used in a policy, it is also clear that where a clause appearing in one part of the policy is to be read with another clause in a different part of the policy, this should be done to give effect to intention of the parties. Thus, it is clear in the present case that condition 29 must be read with General Condition 3 and this undoubtedly will have the effect of making condition 29, as a condition precedent. This is how the conditions ought to be interpreted.

What is the effect of a Condition Precedent?

[17] Where a term in a policy is stipulated to be a condition precedent, the insurer is not liable under the policy if the insured is in breach of the term of the condition. This is because compliance with the term has been made a condition precedent before the liability of the insurer arises under the policy. This proposition is illustrated in the case of *London Guarantee Company v Fearnley* (1880) 5 AC 911 a decision of the House of Lords. In that case, among the terms in the insurance policy was one which provided:

> That the employer shall, if and when required by the company ... use all diligence in prosecuting the employed to conviction for any fraud or dishonesty (as aforesaid) which he shall have committed, and inconsequence of which a claim shall have been made under the policy … .

[18] The policy (in that case) also provides that the insurance cover was subject to all the conditions of the policy, 'which shall be conditions precedent to the right on the part of the said employer (the insured) to recover under the policy'.

[19] A claim for loss was made by the insured under the policy. However, it was revealed that the insured did not pursue criminal prosecution against the employee, which was in breach of the condition precedent referred to above. The House of Lords held that the insured was not entitled to recover under the policy until he had complied with the condition precedent. The following words of Lord Watson are instructive:

> When the parties to the contract of insurance choose in express terms to declare that a certain condition of the policy shall be a condition precedent, that stipulation, ought, in my opinion, to receive effect, unless it shall appear to be either so capricious and unreasonable that a Court of Law ought not to enforce it, or to be *sua natura* incapable of being made a condition precedent.

[20] In the present case, General Condition 3 of the policy stipulates that all conditions of the policy are to be regarded as condition precedent. Therefore clear that if there is non-compliance with condition 29, no liability arises under the policy.

[21] When a term in a policy is stipulated to be a condition precedent to the liability of the insurer, the condition has to be strictly complied with by the insured before the insured is entitled to bring a claim on the policy. This proposition is illustrated in the case of *Chong Kok Hwa v Taisho Marine & Fire Insurance Co Ltd* [1977] 1 MLJ 244. In that case the Court held that when a term in an insurance policy was stipulated to be a condition precedent to the liability of the insurer, the insurer was not liable under the policy unless the term has been strictly complied with by the insured. His Lordship Ajaib Singh J said:

> The appellant was required to give notice of the accident to the respondent as soon as possible after its occurrence under one of the condition in the policy. Another condition provided that every notice or communication to be given or made under the policy should be delivered in writing to the respondents ... . The obligation on the part of the appellant to give notice of the accident and to deliver the notice in writing to the respondents had to be satisfied before the respondents could became liable under the policy for it is expressly stated in the policy that the due observance and fulfilment of the term as of the policy is so far as they relate to anything to be done by the appellant shall be condition precedent to any liability of the respondents to make payment under the policy.

[22] It is well settled that where an insurer seeks to repudiate liability for a breach of a condition precedent by the insured, the insurer is not required to show that he has been prejudiced by the breach. This is consistent with the position relating to warranties as well. It is trite that warranties have to be strictly complied with, like conditions precedent. Therefore, if there is a breach of warranty entitling the insurer to repudiate liability, it matters not if the breach has no bearing or connection with the loss. In *Pioneer Concrete (UK) v National Employers Mutual General Insurance Association Ltd* [1985] 1 Lloyd's Rep 274, the insured contended that for the insurer to rely on a breach of condition precedent to repudiate liability, he must first show that he has been prejudiced by the breach. This argument was rejected by the court. Bingham J ruled:

> The Plaintiffs submit that even if there was a breach of condition (i), the insured cannot rely on it without showing prejudice. This is, I think, as stated, a surprising proposition … . On ordinary principles of contract, it would seem to me that the insurer could rely on this breach of condition whether the breach caused him prejudice or and whether the refusal of payment in these circumstances was in general terms meritorious or unmeritorious … . I find no support in many later authorities for the requirement of prejudice and, as a matter of general contractual principles, it appears to me that this cannot be required of an insurer before he relies on a breach of a condition precedent in the policy.

[23] In the present case, the defendants need not show that the breach to comply with condition 29 by the plaintiff has prejudiced them. As such, the breach of or non-compliance with condition 29 (a condition precedent), without more, is sufficient for the defendants (as insurer) to repudiate liability under the policy.

Reasons Behind Condition 29

[24] Before alluding to the various facts which form the substratum of the defendants' case that condition 29 had been breached, it is appropriate at this stage to first, understand why condition 29 was introduced in the first place. This can be gathered from the evidence of Zakri Mohd Khir, who was at the material times, the general manager in the first defendant. Zakri Mohd Khir is his evidence states as follows:

The reason for the need to incorporate an explicit condition or fire safety measure was that there had been a number of cases where fire had been the cause of considerable loss and damage in major construction projects. It was the general view of the industry that fire prevention and safety measures were not sufficiently practiced or observed. As such, for insurers, it was decided that clear and explicit fire warranties were necessary.

[25] Hence, the introduction of condition 29 into the policy in the present case. In fact, Zakri Mohd Khir's evidence was that fire conditions such as condition 29 were first used in the policy documents of Munich Re (a leading global reinsurance company) and is still used throughout the world. Significantly, when the first defendant tendered for the Putrajaya Project to provide insurance coverage, condition 29, was incorporated into the policy wordings and this was accepted by the brokers. The brokers represented the plaintiff in all aspects of the insurance placement. As such, it is clear that the plaintiff agreed and assented to the incorporation of condition 29. It is not contended otherwise by the plaintiff.

ISSUE 2: WHETHER THE PLAINTIFF FAILED TO COMPLY WITH OR HAD OTHERWISE BREACHED THE PROVISIONS OF CONDITION 29

[26] On the evidence, there was clearly a breach of condition 29 by the plaintiff. The evidence of Neil Davies, a loss adjuster with Thomas Hawell Group, shows that he attended the site and personally carried out surveys and investigations. From his investigation he prepared several reports. The most critical of these, concerning the issue of condition 29, is the report dated 18 September 1999. It is significant that Neil Davies carried out site inspection and issued a contemporaneous report. As such the findings in his reports should be regarded as *prima facie* accurate. In his reports of 18 September 1999 Neil Davies set out in detail his findings with precise focus on the issues relating to compliance or otherwise with the requirements of condition 29. The investigation was precisely with condition 29 in mind and therefore sufficient weight should be accorded to the findings. In carrying out the investigations Neil Davies specifically explored the very areas contemplated by condition 29.

[27] Item 1 of condition 29, stipulates that with regards to the progress of work, adequate fire fighting equipment and sufficient extinguishing agents are available and operating at all times. Neil Davies' evidence indicates in clear terms that there was inadequate fire extinguisher equipment. He physically inspected the buildings at the project site to determine if there were sufficient fire extinguishers. He enquired with Mohan Ram (plaintiff's safety officer) on the status of the fire extinguishers at the basement. The answer he received was inconclusive. He was unable to gather more than what Mohan Ram told him as the basement was considerably damaged. Neil Davies conducted a physical inspection of buildings D4 and D5 which were at more advanced state of completion than the basement car park. His physical inspection of

these buildings produced astonishing findings. In building D4, there was not one single fire extinguisher. At D5 building he found one (1) fire extinguisher and even that was discharged and therefore not functional. The conspicuous absence of fire extinguishers at the site clearly constitutes a breach of item 1 of condition 29.

[28] Neil Davies was not seriously shaken in cross-examination. He conducted inspection personally with the trained eyes of an experienced loss adjuster. In his investigations, Neil Davies also interviewed Mr Gan Peng Teng and Mr Choo King Hwa. Mr Gan Peng Teng was the plaintiff's senior project manager. He would therefore have been overall in-charge and able to provide information relating to the project. Unfortunately, he was not called as a witness by the plaintiff. Mr Choo King Hwa (his subordinate) was called as a witness by the plaintiff, but his evidence on fire extinguishers was almost non-existent.

[29] As far back as in October 1999, the plaintiff had already been notified of their breach of condition 29 (vide letter dated 25 October 1999). The plaintiff had therefore ample time and opportunity to present evidence and documents to rebut the allegation of breach. The plaintiff issued two letters dated 23 November 1999 and 17 December 1999 signed by Mr Gan Peng Teng, the senior project manager of the plaintiff. In these two letters, apart from issuing bare assertions of compliance with condition 29, no documents whatsoever were produced to support the assertions. Surprisingly, Mr Gan Peng Teng was never called as a witness by the plaintiff.

[30] The plaintiff's safety officer, Mohan Ram, as can be seen in his testimony, was not even sure how many fire extinguishers there were, at the project site.

[31] It is completely shocking for a safety officer not to be able to say as a matter of personal knowledge, how many fire extinguishers the plaintiff had, as this was an integral part of fire safety measure. The following evidence from Mohan Ram is revealing:

(i) he claimed there were 10 fire extinguishers in the basement car park of Block D10. On further cross-examined he suggested there were 12;

(ii) he hesitated long and hard when he was asked to mark the location of the fire extinguishers in the basement car park at DIO;

(iii) he said, after use the fire extinguishers would be recharged. But he did not know of any record of recharging;

(iv) he only suggested that there were 72 fire extinguishers when some documents were shown to him. He had no personal knowledge of these documents. In any event the assertion that there were 72 fire extinguishers contradicts Mr Gan's letter dated 17 December 1999 which indicates at most only 50;

(v) he also claimed in cross-examination he did not remember how many fire extinguishers were there at D4. Neil Davies said he saw none.

[32] The court is satisfied that Mohan Ram's evidence on the number of fire extinguishers at the project site is totally unreliable. Other then Mohan Ram, the plaintiff called no other witnesses to testify on the number of fire extinguishers and how these were placed at the project site. Significantly no one from the Equipment Department (such as store manager or supervisor) was called by the plaintiff. These witnesses would have been able to rebut effectively Neil Davies evidence that he saw no fire extinguishers at all in Block D4 and only one (1) in Block D5. The documents produced by the plaintiff are far from sufficient in proving that there were sufficient extinguishers at the site. Therefore on the balance of probabilities the court is satisfied that the plaintiff failed to comply with item 1 of condition 29, in having sufficient fire extinguishers at the project site.

[33] Item 2 of condition 29 provides that the cabinet containing hose reels and portable fire extinguishers are to be inspected at regular interval but at least twice a week. Neil Davies' evidence indicates that the fire extinguishers were inspected once every two weeks, contrary to condition 29 which requires inspection to be conducted twice weekly. Mohan Ram however suggested in his evidence that the inspection was conducted 'regularly'. For a person who could not even remember how many fire extinguishers the project site had and where they were located, Mohan Ram's claim of 'regular' inspection must surely be treated with extreme caution. Mohan Ram claimed he checked the fire extinguishers himself with three other subordinates. None of these subordinates were called to corroborate his evidence. Further, if these were regular inspections, there would have been records. Apart from Mohan Ram's bare assertion, no such records were produced. Mohan Ram contradicted what Mr Gan Peng Teng said in his letter dated 17 December 1999 that the fire extinguishers were inspected only once in a fortnight, and not twice a week as required by condition 29 and this clearly constitutes a breach of item 2 of condition 29.

[34] Item 4 of condition 29 provides that waste material is to be removed regularly and all floors undergoing fit out work are to be cleared of combustible waste at the end of each working day.

[35] Neil Davies reported from his own physical inspection that not all waste materials were removed on a daily basis. He also reported that the worst affected location in terms of housekeeping was the basement areas and this of course included the basement car park where the fire occurred. Neil Davies' observation is supported by compelling independent evidence in the form of the Bomba report. This is another revealing piece of evidence which goes a long way in illustrating, amongst others, the appalling state of waste materials and housekeeping at the project site. Item 7 of the Bomba report states.

7.3 Keadaan barangan di basemen yang berselerak dan tidak tersusun mengganggu dan melambatkan tindakan bomba.

[36] From the photographs attached to the Bomba report, much of these materials were inflammable. More significantly, the Bomba report attributed the cause and spread of fire to bad housekeeping. At item 93 the Bomba reported:

> 9.3 antara sebab-sebab berlaku kebakaran dan kemerebakan api adalah ...
>
> 9.4 Bad housekeeping terdapat timbunan tin-tin cat yang tidak tersusun serta tabung-tabung gas acetylene, timbunan-timbunan barang yang mudah terbakar. Dalam erti kata lain, basemen ini dijadikan tempat simpanan (stor) bahan-bahan binaan pihak kontraktor.

[37] Neil Davies also attached photographs of the condition of the basement which illustrate the extremely appalling condition in terms of housekeeping. This is consistent with the Bomba's observations. The only conclusion that can be drawn from those observations is that there was no regular clearance of waste material and more importantly, other inflammable material from the site. This is a clear breach of item 4 of condition 29.

[38] Item 5 of condition 29 provides for the 'hot work' permit. In full, item 5 stipulates:

> A permit to work system is implemented for all contractors to engage in 'hot work' of any kind such as, not limited to grinding, cutting or welding operation use of blow lamps and torches application of hot bitumen or any other heat producing operation.

[39] For this issue, it is important to first understand why it was so critical that a 'hot work' permit be implemented and what was the nature of the permit that was contemplated.

[40] The starting point is to examine the Putrajaya Holding Safety Manual, which includes an Appendix 'A' ie a document entitled 'Putrajaya Holdings Fire Emergency Procedures'. The introduction section of this document states that it is a requirement of the project insurers that comprehensive fire emergency procedures are set up by each construction package. It is therefore clear that the fire condition (condition 29) was an important element in the entire project and was stipulated as insurer's requirements. The manual then provides in explicit terms that the 'hot work' permit was mandatory. This is set out under the heading 'Welding and Burning' at clause 9.5:

> Welding and/or burning work shall only be done under the control of a 'hot work' permit.

[41] This is repeated in Appendix 'A' at Clause 4.9.0 under the heading – "hot work" which provides as follows:

> 4.9.1 Set up and detail a 'hot work' permit system which shall cover welding (all types) cutting burning soldering or braising grinding use of abrasive wheels any sparks or naked flame An example of a 'hot work' permit is included in appendix 3.

[42] Appendix 3 in the specimen 'hot work' permit. This provides in detail, the various check list which must be issued and signed by a responsible person employed by the contractor and appropriately dated. This system only allows for 'hot work' to commence after a 'hot work' permit in this form has been issued and signed. This is a very critical safety procedure in a highly dangerous location such as a large building under construction. A list of checks has to be done on various safety aspects before the permit is issued. The plaintiff as the contractor would therefore have been clear as to what their responsibilities were under the manual which expressly stipulated that the fire procedures were to comply with the insurer's requirements.

[43] Now, let's turn to the evidence in the present case. The most significant evidence is that there is a clear admission on the part of the plaintiff that they did not have any 'hot work' permit system at the basement area where the fire occurred. This can be seen from the plaintiff's letters dated 23 November 1999 and 17 December 1999. In both these letters, Mr Gan Peng Teng, the senior project manager of the plaintiff states that there was no 'hot work' permit system as, according to him, "this was only a temporary storage". Since condition 29 stipulates the requirement of a 'hot work' permit system to minimise risk of fire, it did not matter that the basement was a temporary storage area. In fact, it cannot be disputed that the 'hot work' was carried out there as the Bomba found considerable quantities of 'hot work' materials there. With this condition there is a clear breach of Item 5 of condition 29.

[44] Mohan Ram claimed in his evidence that there was a 'hot work' permit system which entailed the use of a certain form. He specifically referred to a particular document which contains a form entitled 'Gas Cutting Monthly Inspection Report'. A quick perusal of this form shows clearly that it is not a form containing safety checklists to be complied with before 'hot work' was carried out. It is instead, an inspection list, relating to inspection of 'hot work' equipment. The form suggests that it is a monthly inspection report. By no stretch of imagination can this be a 'hot work' permit. Later, in the midst of trial, Mohan Ram produced another document (P8) and claimed that was the form which constituted the how work permit. Again, this document (P8) is obviously not a 'hot work' permit.

[45] As a whole, the court is convinced that there was indeed no 'hot work' permit system. This is yet another breach of condition 29.

[46] Item 3 of condition 29 provides that opening for lift shafts, service ducts and other voids are to be provisionally closed as soon as possible but not later at the commencement of fit out work.

[47] There is evidence by Neil Davies that in his physical inspection at D5, although fit out work were in progress, the lift shafts were not sealed. This evidence was not challenged. This being the case, the plaintiff has clearly breached item 3 of condition 29.

[48] Item 6 of condition 29 provides as follows:

> Storage of materials for constructions or erection shall be subdivided into storage not exceeding the value stated below per storage unit. The individual storage unit shall be either 50m apart or separated by fire proof walls. All inflammable materials and especially all inflammable liquids and gases shall be stored at sufficiently large distance from the property under construction or erection and any 'hot work'.

[49] The presence of inflammable materials within the basement car park is clearly made out. The Bomba reports (together with the photographs attached thereto) clearly illustrate the presence of a considerable amount of inflammable material kept within the basement car park. In item no 9.3.1 of the reports, the Bomba confirmed that there were tins of paint, oxy-acetylene canisters and other inflammable materials within the areas where the fire occurred. In his physical inspection, Neil Davies noted that the storage of these inflammable was not within fire proof walls, but partitions made of plywood. On that evidence available, clearly the plaintiff was in breach of item 6 of condition 29.

[50] The evidence of breach of condition 29 by the plaintiff is overwhelming, particularly items 1, 2, 3, 4, 5 & 6. As has been pointed out, condition 29 read together with General Condition 3 is a condition precedent. As such, the well established principles applicable to the effect of a breach of a condition precedent must be applied. The principle is that the condition precedent must be strictly complied with, failing which, no liability arises under the policy. This is so even if the breach of the condition precedent does not give rise to any prejudice on the part of the insurer (defendants, in this case).

[51] The court shall now turn to deal with the plaintiff's case on condition 29.

Condition 29 — Incapable of Performance

[52] The plaintiff first contended that the terms of condition 29 are incapable of performance. From this, it is understood that the plaintiff is saying that they could not, with reasonable diligence, comply with condition 29.

[53] Condition 29 was incorporated into the policy documents at the outset when the first defendant tendered for the business to provide the insurance package. No protest was raised either by the principals or the plaintiff as main contractors. Condition 29 was referred to the brokers who represented the insureds. The brokers did not protest its inclusion. It was included with their agreement. It is therefore highly improbable that all parties, experienced in the business, could have accepted the inclusion of condition 29 into the policy, if its terms were incapable of performance. In the two plaintiff's letters dated 23 November 1999 and 17 December 1999 the senior project manager, Mr Gan Peng Teng, did not indicate that the terms of condition 29 were incapable of performance. Instead, he made explicit statements that the various requirements in condition 29 had been complied with. In the course of trial, no evidence was adduced by the plaintiff to demonstrate how the terms of

condition 29 could not be performed. Throughout the period when the insurance subsisted the plaintiff did not even once, raise the issue that condition 29 was incapable of performance condition 29 contains terms as to fire safety measures which are similar to the principal's (Putrajaya Holdings) Safety Manual. The safety manual was directed to all contractors, which would have included the plaintiff. There was no indication at all that the plaintiff had ever raised the issue that the fire safety measures in condition 29 were incapable of performance.

[54] Looking at some of the relevant terms of condition 29, it is at once clear that each and every requirement can be properly observed and performed. Item 1, for example, it is surely possible to install a sufficient number of functional fire extinguishers at suitable a location at the project site. For item 2 — it is equally possible that regular inspections be conducted at the cabinets containing the hose reels and fire extinguishers. All that was needed was a team perhaps led by the safety officer of the plaintiff. Item 3 — it is also possible to close or seal up all openings for the lift shafts, service ducts etc on the commencement of fit out work. As per item 4 — for the 'hot work' permit, there is no doubt that this system could have been employed. Indeed it is well known in the industry that 'hot work' system is commonly employed in all areas where 'hot work' is carried out. It is not a system peculiar to construction and certainly not something unusual or novel.

[55] These are basic, albeit, detailed fire safety measures which were required under condition 29. The plaintiff's suggestion that these requirements are incapable of performance must therefore be rejected.

Condition 29 — Vague and Ambiguous

[56] The next point raised by the plaintiff is that the terms of condition 29 are vague and ambiguous and therefore unenforceable.

[57] The court had examined the clear words used in condition 29. There is simply nothing vague or ambiguous, about the entire provisions. The plaintiff called no witness to give evidence that condition 29 is vague and ambiguous. Instead, Mohan Ram, the plaintiff's safety officer, in his witness statements claimed that the plaintiff had complied with condition 29. Mr Gan, the plaintiff's senior project manager, in his letters of 23 November 1999 and 17 December 1999 also did not say that condition 29 was vague and ambiguous.

[58] The defendant's witness, Zakri Mohd Khir in his evidence in-chief, stated explicitly that condition 29 was modelled on the fire policies of Munich Re (a leading global re-insurer) and has been and still used in various parts of the world. This evidence has not been challenged at all. If condition 29 is vague and ambiguous, this could hardly have been possible. In the present case, the said condition 29 had been accepted and assented to by the principals (Putrajaya Holdings) brokers and all the other co-insurers. This simply does not get well with the plaintiff's contention that condition 29 is vague and ambiguous.

[59] The court is satisfied that there is no ambiguity in condition 29. Therefore the rule of '*contra proferentum*' as alleged by the plaintiff is not applicable. This rule must not be used to create an ambiguity where none exists. (See: (i) *London & Lancashire Fire Insurance Co v Boland* (1924) AC 836; (ii) *Alder v Moore* [1960] 2 Lloyd's Rep 325).

[60] The basic presumption is that the words should receive their ordinary and natural meaning, and this is displaced only when there is a real ambiguity either appearing on the face of the policy or revealed by extrinsic evidence. (See: (i) *Condogianis v Guardian Assurance & Co* (1921) 2 AC 125; (ii) *Yorke v Yorkshire Insurance Company* (1918) 1KB 662).

[61] If the meaning of the words is reasonably clear it must be given full effect even if it operates harshly against the assured. (See: *Woolford v Liverpool CC* [1968] 2 Lloyd's Rep 256).

[62] The position of the law is clear. Where the meaning of the words used is clear (as in condition 29), effect must be given to it. One should not strain the language to find an ambiguity when none exists. The words used in conditions 29 are plain and simple. No technical words or complex phrases are used. There is no ambiguity. Therefore, the plaintiff's allegation that condition 29 is vague and ambiguous cannot stand and must be rejected.

ISSUE: WHETHER THE DEFENDANTS WERE ESTOPPED FROM RELYING OR HAVE WAIVED THEIR RIGHTS TO RELY ON CONDITION 29 TO REPUDIATE LIABILITY UNDER THE POLICY.

[63] The court shall now deal with the plaintiff' case based on estoppel/waiver. The plaintiff contended that the defendant had knowledge of the breaches from the reports issued by the Risk Managers, Asia Pacific Risk Management Center (APRMC). The Plaintiff said that since the defendants knew about the breaches through APRMC reports, and did nothing, they are now estopped from or have waived their rights to rely on the breaches to repudiate liability.

[64] Before examining the evidence in relation to estoppel/waiver in the present case, the court shall highlight first on the legal position. It is, at the outset, necessary for the plaintiff to prove that the defendants had full knowledge of the breaches. The defendants' knowledge of the breaches must be full and complete, before waiver or estoppel can be asserted. This is best illustrated by Justice Woolf in *Victor Melik & Co Ltd v Norwich Union Fire Insurance Society Ltd* [1980] 1 Lloyd's Rep 523, when he said:

> When he heard from Mr Melik, as I am satisfied he did, that the alarm was not going to be repaired, Mr Kemp did not communicate again with the insurers, and if there was going to be any reliance upon a waiver or an estoppel here, in my view, it was essential that the fact should be brought to the knowledge of the insurers if they were gong to be in a situation where they were not going to be entitled to rely on the terms of the policy which they were otherwise entitled to reply upon. That

> really means that what happened here was at best the giving of information to the insurers of a limited nature. There was not full knowledge, and, what is more, there was no inactivity in these circumstances is insufficient to amount to a waiver. My view as to waiver also applies to estoppel. Estoppel can be by conduct. The conduct can be such as to give rise to a representation that the particular term of the policy will not be relied upon. Here, there was nothing which in fact could amount to such a representation.

[65] In *Chong Soo Sin v Industrial & Commercial Insurance (M) Bhd* (1992) 1 MLJ 636, the court considered the issue of waiver of a breach of warranty. In that case, the insured contended that the insurer had knowledge of the breach through its agents but waived the right to rely on the breach. On the question of knowledge, Siti Norma Yaakob J(as she then was) ruled that even when the breach had been communicated to the sub-agent, there was no actual knowledge on the part of the insurer. The implication of this is clear - it must be shown that the insurer had full and actual knowledge of the breach before waiver can be asserted.

[66] Knowledge of the breach cannot be imputed to the defendants simply because the circumstances suggest that there is a possibility of a breach of condition 29. This is especially so since the plaintiff was contractually bound to comply with condition 29. It was not for the defendants to remind the plaintiff to comply. (See *Arterial Caravans Ltd v Yorkshire Insurance Co Ltd* [1973] 1 Lloyd's Rep 169).

[67] In the present case, it is for the plaintiff to comply with condition 29; not for the defendants to remind them to comply.

[68] The requirement that the insurer must have full knowledge of the breach is further illustrated in case of *Locker & Woolfe Company Ltd v Western Australian Insurance Company Ltd* (1936) 54 Lloyd's Rep 211 where the Court held on the requirement of full knowledge, as follows:

> There must be, in the first place, full knowledge of the circumstance, and, knowing the circumstances, the insurers must do some act which, apart from the policy, they are not entitled to do … . Now, the full circumstances, that is to say, the fact of the non-disclosure were not known until the beginning of October.

[69] The evidence in the present case indicates that the defendants had no knowledge of the breach of condition 29, at all. The APRMC report cannot be taken to have imputed knowledge of the breach to the defendants. Indeed Zakri Mohd Khir (the defendants' witness) testified that since inception of the policy on 25 July 1999 to the date of the fire on 16 August 1999, he did not receive any report from APRMC. Further, he said, he did not receive any advice from APRMC of any breach of condition 29. If one looks at the APMRC report, assuming that it was submitted to the defendants, it is still very far from showing that the defendants could derive any knowledge from the report about any breach of condition 29 by the plaintiff. APRMC provided a value-

added risk management service which the defendants arranged for. They had no obligations to provide this value-added service but did it as part of the project package to value add. The role of APRMC was not confined to surveying fire risks. In fact, fire only occupied one section of the report. Even when the section on fire is examined (s 6.6), nothing in there to suggest that there was any breach or non-compliance of condition 29. It must be remembered that the law requires full knowledge. Section 6.6(a) of the APRMC report suggests that when viewed externally there did not appear to be presence of any dangerous flammable liquid. Similarly, at s 6.6(b) it was reported that there was no unusual storage of low flash point solvents which may cause explosion. At s 6.6(c), APRMC reported on fire extinguishers. It simply said that there were a number of fire extinguishers within the project site (location not specified). These cannot attribute knowledge of breach of condition 29.

[70] The court is satisfied that the APRMC report does not in any way contain any materials to suggest that there were breaches of condition 29. There is simply no knowledge on the part of the defendants of the breaches of condition 29 by the plaintiff, much less full knowledge. Therefore, the plaintiff reliance on waiver/estoppel is absolutely untenable.

OTHER ISSUES RAISED SETTLEMENT OF PREVIOUS CLAIMS

[71] The plaintiff also relied on the various claims which the defendants had paid previously. They contended that somehow, settlement of these claims constituted waiver on part of the defendants.

[72] The court cannot agree with this contention. There is no law that simply because an insurer has settled a claim previously, he cannot hereby repudiate a subsequent claim. Each claim is treated differently based on the facts and circumstances that give rise to the claim. Insurers can repudiate any claim if there are grounds to do so. In the present case, looking at the previous claims, most of them are not even fire claims. They are relatively minor claims. They are different from the claim in the present action. As illustrated, the previous claims are for damage done by contractors, damage due to faulty design, damage from collapse and damage to culvert. So different are these claims from the present fire claim that it is simply impossible to suggest that settlement of these claims can set up a waiver against the defendants.

Authority to Repair/Interim Payments

[73] The plaintiff also suggested that since the defendants gave authority to the plaintiff to proceed with repairs that amounts to a waiver of the breach. Again the court cannot agree with such suggestion.

[74] To start with, it is common for insurers to conduct an adjustment of claim pending determination of liability. Just because the defendants instructed adjusters to assess the damages did not mean that the defendants waived the

breach committed by the plaintiff. More significantly, it was made clear by the defendants that the adjustment for repairs was made strictly without prejudice to liability. The claim manager of the first defendant, Mr Lim Gein Hin in his evidence said:

> Part of Neil Davies' work involved assessing the various claims to ensure that they were reasonable in terms of quantum. It was however made clear to the plaintiff that the involvement of adjusters was entirely without prejudice to the issue of policy liability.

[75] The adjusters also, in their letter 22 September 1999 had stated that: '*Please note that our actions are without prejudice to insurer's position on liability*'. The first defendant themselves made it absolutely clear that the plaintiff could proceed with repairs or reinstatement of the damages works, on a without prejudice and without admission of liability basis. There is therefore no merit in the plaintiff's contention that the defendants waived their rights to rely on the plaintiff's breach just because they allowed the repairs to proceed.

[76] As to the interim payments, these were also made on the same basis ie without prejudice and without admission of liability. In his evidence Mr Lim Geim Hin, the first defendant's claims manager stated that in one of the meetings, the plaintiff requested the defendants to consider making an interim payment pending the completion of investigation. In his affidavit of evidence-in-chief, he stated that:

> As far as insurers were concerned, any payment under the policy must be dependent on policy liability. Only after liability was established would the quantum be finalised and payment made. As such, when the plaintiff requested that we consider making interim payment, I indicated that we were willing to consider it subject to policy liability being established. I stressed this clearly to the plaintiff at the meeting of 9 September 1999. This was the consistent position which I took all through.

[77] This position was corroborated by the adjuster's advice which they set out in their report of 7 October 1999 where it is said in explicit terms that. 'It is to be noted that this proposed payment is strictly subject to insurer's considerations on application of policy liability to the claims.' This was further corroborated by Zakri Mohd Khir (at Q27 of his affidavit of evidence-in-chief) when he said that the first defendant had indicated that they were willing to consider the plaintiff's request for interim payment, subject entirely to liability being established under the policy. The plaintiff's contention that the defendants waived their rights by agreeing to consider interim payments, is therefore entirely unmeritorious.

Condition 29 — Not Material to the Loss

[78] The plaintiff also contended that even if there were breaches of condition 29, these were not material to the loss.

[79] The court cannot agree with this contention. Where there is a breach of condition precedent, the breach need not prejudice the insurers. As such, even if the breach is not material to the loss, the insurer is still entitled to repudiate liability pursuant to the terms of the policy. This principle was illustrated in *Pioneer Concrete (UK) v National Employers Mutual General Insurance Association Ltd* (1985) 1 Lloyd's Rep 274. In the present case, on the evidence, the breach of condition 29 was indeed, material. The Bomba report shows that due to the failure to dispose the waste and inflammable materials regularly, the fire was allowed to spread rapidly. Further, this aspect of bad housekeeping also impeded the firemen to carry out fire fighting effectively. Neil Davies had also observed in his investigation, that the presence of waste materials and inflammable items caused the fire to spread rapidly. Accordingly, the contention by the plaintiff that the breach of condition 29 was not material to the loss must fail.

Bank Negara Malaysia (BNM) Guidelines

[80] In their submissions, the plaintiff relied heavily on the contention that the defendants had failed to comply with BNM Guidelines in handling the claims. The plaintiff argued that BNM Guidelines have the force of law and therefore statutorily and contractually binding on the defendants. The plaintiff further argued that BNM Guidelines provide, *inter alia*, that an insurer shall not deny a claim merely on the ground of technical breaches of warranty or policy conditions which are not material or unconnected to the circumstances of the loss, unless fraud is suspected. To the plaintiff, BNM Guidelines therefore have altered the well established common law principles that where there is a breach of warranty or condition precedent, the insurer is entitled to repudiate liability and it matters not that the breach has no connection with and is not material to the loss. In the present case, the plaintiff contended that the fire is fortuitous and there was no fraud or arson. As such the plaintiff contended that the defendants are not entitled to repudiate liability based on the breach of condition 29.

[81] The said BNM Guidelines cited by the plaintiff is known as the Claims Settlement Guidelines dated 25 February 1995 issued by the Insurance Regulation and Supervision Departments of Bank Negara Malaysia (BNM). The guidelines under the heading 'Coverage' at p 2 provides that they are required to be observed by all general and composite insurance companies in relation to their general insurance business. The relevant part of the said guidelines relied upon by the plaintiff is under heading 'Settlement' at p 9 which provides:

> … An insurer should not deny a claim merely on grounds of technical breaches of warranty or policy conditions which are not material or unconnected to the circumstances of loss, unless fraud is suspected … .

[82] The said BNM Guidelines were issue by BNM under s 201 of the Insurance Act 1996 (the Act) which empowers BNM to issue guidelines,

circulars or notices in respect of their Act relating to the conduct of the business and affairs of the licensee (insurer).

[83] Even assuming that the said BNM Guidelines have the force of law (being subsidiary legislations), the court is of the view that the relevant paragraph at p 9 of the Guidelines (cited above) does not cover the situation in the present case. In other words, in repudiating their liability under the policy, the defendants did not breach the said provisions of the BNM Guidelines. The said guidelines prohibit the insurer from denying a claim merely on the grounds of *technical breaches* of warranty or policy conditions *which are not material or unconnected to the circumstances of the loss*. The key words in the said guidelines are: '*technical breaches of warranty of policy conditions which are not material or unconnected to the circumstances of loss'*. In order to be caught under the said guidelines, the breaches in question must be in the nature of 'technical breaches' and such 'technical breaches' must be 'not material or unconnected' to the circumstances of loss. In other words, an insurer is not caught under the said Guidelines if the breaches are not 'technical' in nature and/or are material or connected to the circumstances of loss.

[84] In the present case, the court has illustrated above that condition 29 is a condition precedent in the policy which must be strictly complied with by the plaintiff. They are substantive conditions, not merely technical in nature. The court has also illustrated that there are breaches of conditions 29 on the part of the plaintiff. The plaintiff had failed to comply with certain provisions of condition 29. These breaches are not technical in nature. The court has also illustrated that those breaches were material and connected to the circumstances of the fire and the loss. Such being the case, the court is satisfied that the defendants were right in repudiating liability under the policy. The defendants are not prohibited from doing so under the said BNM Guidelines as alleged by the plaintiff, and therefore there is no breach of the said BNM Guidelines by the defendants in repudiating liability under the policy in the present case.

CONCLUSION

[85] For all the reasons set out above, the court holds that the defendants had lawfully repudiated liability by reason of breach of condition 29 by the plaintiff. As such, the plaintiff's claim against the defendants (on liability) in this action is dismissed with costs.

Plaintiff's claim dismissed.

Reported by Loo Lai Mee